PASS MINERALS, INC.

IBLA 99-371, 99-384 Decided November 3, 1999

Appeal from a decision of the Nevada State Director, Bureau of Land Management, upholding on State Director review the decision of the Las Vegas Field Office Manager, Bureau of Land Management, suspending mining plan of operations N54-95-031P and appeal from two decisions of the Nevada Deputy State Director, Minerals Management, Bureau of Land Management, returning surety bonds and riders for mining plan of operations N54-95-031P.

Set aside and remanded; petitions for stay denied as moot.

1. Mining Claims: Plan of Operations

When BLM approves a mining plan of operations subject to certain conditions, including the posting of an interim reclamation bond, mining may not proceed until the conditions are satisfied. However, a decision on State Director review upholding the suspension of the processing of a plan of operations on the basis of the failure to post a bond will be set aside when the record shows that the operator made a good faith effort to comply with the bonding requirements imposed by BLM and the state regulatory authority and, in fact, properly posted the required bond with BLM prior to the State Director's decision.

2. Mining Claims: Plan of Operations

The mere pendency of a mining claim validity examination is not a basis for suspending consideration of a mining plan of operations. It is not until the completion of such an examination with the appropriate reviews and the initiation of a contest that suspension of consideration of a plan would be justified.

APPEARANCES: K. Ian Matheson, President, Pass Minerals, Inc., Henderson, Nevada, for appellant.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Pass Minerals, Inc., has appealed from three decisions issued by the Nevada State Office, Bureau of Land Management (BLM). The first is a July 30, 1999, decision of the Nevada State Director, BLM, upholding, on State Director review in accordance with 43 C.F.R. § 3809.4, an April 5, 1999, decision of the Field Office Manager, Las Vegas Field Office, BLM, suspending Pass Mineral's plan of operations for the development of the Mijo 16 placer mining claim in the NW¼ sec. 14, T. 23 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada. The Field Manager provided two reasons for his action. First, he stated that Pass Minerals had failed "to post and maintain a reclamation bond with the BLM Nevada State Office." (Field Manager's Decision at 1.) Second, he explained that BLM was conducting a validity examination of the claim and that "[t]he plan was suspended pending the completion of the final report and if necessary, the filing of a mineral contest action against the claim." Id. The Board docketed this appeal as IBLA 99-371.

The other two decisions were issued by the Nevada Deputy State Director, Minerals Management, BLM, on August 9, 1999. One returned Surface Management Surety Bond 384369 in the amount of $97,332 and the attached rider with no action. That bond had been posted by Hanson Aggregates Las Vegas, Inc. (Hanson), formerly known as Industrial Construction, Inc. (Industrial Construction), with Seaboard Surety Company (Seaboard) as the surety. The rider stated that the bond was posted on behalf of Pass Minerals. The second decision returned Surface Management Surety Bond 16 005 241 and the attached rider with no action. The bond had been posted by ARC Minerals, Inc., d.b.a. CRS (ARC), as principal with Liberty Mutual Insurance Company (Liberty Mutual) as surety. The rider stated that the bond was posted on behalf of Pass Minerals. Both decisions cited as a basis for the lack of action the fact that plan of operations N54-95-031P had been suspended by the April 5, 1999, Las Vegas Field Office decision. The Board docketed Pass Minerals' appeal of these two decisions as IBLA 99-384.

Pass Minerals has filed petitions to stay all three of BLM's decisions. BLM has not filed any response to the petitions.

Factual and Procedural Background

Pass Minerals filed plan of operations N54-95-031P for the Mijo 16 placer mining claim with BLM on August 14, 1995. On May 24, 1996, BLM issued a decision approving the plan subject to certain conditions, one of which was:

> Before work is initiated and within 120 days of receipt of this decision, post phase I of an interim reclamation bond for 26 acres of disturbance. An acceptable bond must be posted in the amount of $52,000.00 or $2,000.00 per acre to the Nevada State Office of the Bureau of Land Management in Reno, Nevada.

(May 24, 1996, Decision at 1-2.)

BLM further stated that "[u]pon accepting, signing and returning one copy of the conditions for approval, paying tortoise mitigation fees, and posting an approved bond, your Plan of Operations will be complete." Id. at 2.

K. Ian Matheson, President, Pass Minerals, signed the conditions of approval on August 25, 1996, and returned them to BLM on August 26, 1996. On September 9, 1996, Matheson filed a memorandum with BLM requesting an extension of 60 days within which to post the required reclamation bond. By letter dated September 12, 1996, BLM granted that extension, stating:

> This office approved your plan of operations, subject to conditions of approval, on May 24, 1996. That decision means that the BLM has completed its work as required under 43 CFR 3809. There is currently nothing obstructing you from the removal of locatable minerals from your mining claims under your mining notice N54-95-032.

In a memorandum to BLM dated November 13, 1996, Matheson requested an additional 60 days within which to post the reclamation bond. The case record does not contain any document responding directly to Matheson's request; however, it does show that on December 12, 1996, BLM corresponded with Matheson regarding the tortoise mitigation fees and reclamation bonding, setting forth the language from the conditions of approval of the plan relating to mitigation fees and reclamation bonding and stating:

> Your plan approval was written for the above. I would have to double check with the biologists and the manager as I do not know if we would entertain a new decision. If no, it won't change, if yes the increments might be changeable depending what the biological opinion says. Your reclamation bond would need to have NDEP [State of Nevada, Department of Conservation and Natural Resources, Division of Environmental Protection] approval.
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> What is it you want to do? Spell it out in writing if it is different from the above.

Over 1 year later, on February 13, 1998, BLM issued a letter to Pass Minerals noting that it had received from NDEP a copy of Pass Minerals' plan of operations and reclamation, dated October 2, 1997. BLM required Pass Minerals to file "a signed copy of the permit application sent to NDEP for incorporation into the case file and staff review. This application may be classified as a plan amendment if the information differs sufficiently from the approved plan of operations." Matheson filed the required copy on March 6, 1998.

On April 28, 1998, NDEP issued a notice of final decision stating that it had "decided to issue Reclamation Permit No. 0136, for a Mining Project to PASS MINERALS, INC. This permit authorizes PASS MINERALS, INC.

to reclaim the MIJO 16 PROJECT." NDEP stated that the permit would become final on May 9, 1998. The permit stated that it was valid for the life of the project, but that "[a]dditional surety or approved Phase I reclamation is required before engaging in any Phase II, III, or IV activities." (Permit No. 0136 at 1-2.) Phase I activities were listed as encompassing 20 acres. The permit itself stated at page 1: "This permit becomes effective upon receipt, by the Division, of the surety required by NAC [Nevada Administrative Code] 519A.350." 1/

On June 24, 1998, Matheson filed a memorandum with BLM stating: "Enclosed please find a copy of the above Surety Bond for the project written by Seaboard Surety Company (Seaboard) in the amount of $97,332.00 duly signed and notarized. I trust you will find it in order." Attached to the memorandum was a copy of Reclamation Performance Bond No. 374770 for $97,332 covering plan of operations N54-95-031P naming Industrial Construction, as principal, and Seaboard, as surety, and NDEP as the obligee. 2/ There is no indication that at the time of filing BLM informed Matheson of any deficiencies in the bond. On or about June 24, 1998, a copy of Reclamation Bond No. 374770 was also filed with NDEP.

On August 25, 1998, NDEP issued a letter to Matheson stating that it had reviewed an amendment to the Mijo 16 Project, dated August 10, 1998, and found it consistent with NAC 519A. NDEP stated that "[t]he amendment proposes to disturb an additional 44.5 acres in phases 1 through 4, consistent with the original Mijo 16 plan." NDEP further advised: "Our records indicate that the current surety posted for the Mijo 16 Project is $97,332. The obligated amount under the enclosed amended permit is

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1/ This statement indicates that the surety was to be filed with NDEP. However, the referenced section provides that "[a]n operator shall file a surety with the division or a federal land management agency, as applicable, to ensure that reclamation will be completed on privately owned and federal land."

2/ In the decision under appeal, the Nevada State Director stated at page 5 that the copy of the bond submitted by Matheson was "unsigned; there is no signature by the surety company." However, the copy in the official case file forwarded to the Board by BLM contains a signature by the surety. The bond consists of three pages each designated "Bond No. 374770" in the top right hand corner. The signature of one John H. Price, dated June 22, 1998, signing on behalf of Industrial Construction Inc. appears on page 2. Price is identified by the notary public on page 3 as "Vice President." The notarized signature of Janice Fennell, dated June 16, 1998, appears on page 3 as "Attorney-In-Fact" for Seaboard. Also included with a copy of the bond was a copy of a Power of Attorney, dated Apr. 5, 1995, which the Assistant Secretary of Seaboard attested was in full force and effect on June 16, 1998. That Power of Attorney designated five individuals to sign on behalf of the company, one of whom was Fennell.

$194,664. Please note, the amended Phase 1 activities will require additional bond prior to conducting the work as described." The letter contains no indication of any deficiency in Bond No. 374770. However, in a letter to Matheson, dated November 17, 1998, NDEP stated that in reviewing the file for permit No. 0136 it determined that "you have not filed an acceptable bond with the BLM State Office. Further review shows you filed a copy of a surety bond, which reflected NDEP as obligee. This is not an acceptable surety bond and you are instructed to post an acceptable bond with the BLM." This appears to be the first notice from NDEP or BLM to Pass Minerals informing it that the surety bond was unacceptable.

On November 19, 1998, BLM sent a facsimile to Matheson titled "Problems with Pass Minerals Bond." BLM listed four deficiencies. First, it stated that the bond was a copy and that it needed the original, including an original power of attorney. Second, it stated that the bond was on the wrong form. Third, it noted that the bond improperly showed NDEP as the obligee. "BLM is to hold the bond." Fourth, it stated that Industrial Construction was listed as the principal on the bond, but that Pass Minerals, as the operator listed on the plan of operations, should be the principal, absent a rider stating that the bond was for the operator's benefit.

On December 7, 1998, BLM employee Joel Mur inspected the Mijo 16 Project and reported that "[m]ineral materials are being mined and removed form [sic] Mijo 16." He recommended the issuance of "a trespass when time permits." On January 11, 1999, BLM issued a trespass notice to Pass Minerals and Industrial Construction stating that they were removing sand and gravel from the Mijo 16 under plan of operations N54-95-031P, which provides for the mining of gold. BLM stated that waste rock was being sold for use as sand and gravel without authorization and that it was BLM's position that mineral materials could not be sold from the claim.

In a facsimile dated February 16, 1999, from Matheson to Mur, Matheson stated, regarding the fact that NDEP had been put on the original bond as the obligee: "It is my understanding that this issue was resolved between Cindi Dragon [BLM] and Bill Burger at Industrial Construction." Under section 1(f) of the December 30, 1996, Contract Mining Agreement between Industrial Construction and Pass Minerals, Industrial Construction was to "provide the reclamation bond required by the BLM Mining Plan (the 'Reclamation Bond') * * *."

In a letter dated February 23, 1999, BLM informed Matheson that it did not have any record of the posting of a reclamation bond for plan of operations N54-95-031P. It stated that NDEP had received a facsimile copy of a reclamation bond in which it had been named as the bonded entity, but that "[f]or a reclamation bond to be acceptable, it must be filed with the appropriate office in the appropriate manner." BLM required the posting "of an acceptable reclamation bond at NSO [Nevada State Office] within

7 days of receipt of this letter." In identifying the acceptable amount as $97,332, BLM stated that the "Conditions of Approval were written to permit the acceptance of a reclamation bond in the amount required by NDEP." 3/

Matheson received that letter from BLM on February 25, 1999. Although no bond was posted with BLM within the 7-day period established by the letter, the record indicates that Matheson engaged in numerous contacts with BLM employees following receipt of that letter.

Thereafter, on April 5, 1999, the Las Vegas Field Office Manager issued his decision suspending plan of operations N54-95-031P. Pass Minerals filed an appeal on April 30, 1999, seeking State Director review in accordance with 43 C.F.R. § 3809.4.

On May 3, 1999, Matheson filed with the Nevada State Office, BLM, Surface Management Surety Bond 16 005 241 in the amount of $97,332 for plan of operations N54-95-031P. ARC was designated as the principal and Liberty Mutual as surety. He also filed a rider signed by ARC stating that ARC was posting the bond on behalf of Pass Minerals. Thereafter, on May 28, 1999, BLM received another Surface Management Surety Bond (384369) in the amount of $97,332 for the plan. That bond named Hanson, as principal and Seaboard as surety. The filing included a rider pledging the bond on behalf of Pass Minerals. 4/

On July 30, 1999, the Nevada State Director, BLM, issued his decision upholding the suspension of Pass Minerals' plan of operation. He made clear that his decision was based, in part, on his conclusion that the plan

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3/ The Conditions of Approval provided, in relevant part:

"The operator shall post an interim reclamation bond of $2,000.00 per acre of each acre of surface disturbance. This interim bond is subject to review by the Nevada Division of Environmental Protection, Bureau of Mining Regulation and Reclamation. The payment for each phase of expansion must be made prior to surface disturbance. An initial bond shall be established for 26 acres. Bond increases shall be made in manner that will ensure that all areas of operation are bonded before they are disturbed. The bond will be increased in 25 acre increments. The reclamation bond must be increased according to the following schedule: 'Phase 1 (26 acres) before initial surface disturbance $52,000.00[;] Phase 2 (25 acres) before surface disturbance exceeds 25 acres $50,000.00 etc.'"

Although this condition mentions that the "interim bond" is "subject to review" by NDEP, it expressly establishes the Phase 1 bond amount at $52,000.

4/ The record indicates that, although Hanson's bond was received after ARC's, Matheson intended to discharge Hanson as a subcontractor and employ ARC as the new subcontractor. (BLM note to file in IBLA 99-384, dated June 2, 1999.)

had been only conditionally approved and that Pass Minerals had not satisfied the bonding condition at the time the Las Vegas Field Office issued its suspension decision. He characterized his decision as a suspension of the processing of the plan of operations, rather than as a suspension of the plan itself. On August 9, 1999, the Nevada Deputy State Director, BLM, issued his decisions refusing to take action on the bonds filed for the plan of operations.

Discussion

[1] The record in this case shows that BLM approved Pass Minerals' plan of operations N54-95-031P in May 1996. However, that approval was conditioned, inter alia, on submission of a reclamation bond to BLM in the amount of $52,000. 5/ There is no indication in the approval decision, however, that BLM intended to undertake any further "processing" of the plan. BLM stated at page 2 of the May 24, 1996, approval decision: "Upon acceptance, signing and returning one copy of the conditions for approval, paying the tortoise mitigation fees, and posting an approved bond, your Plan of Operations will be complete." Also, BLM's September 12, 1996, letter to Matheson granting an extension of time to file the bond stated that BLM had "completed its work as required under 43 CFR 3809."

In addition, in accordance with Nevada State law, Pass Minerals was required to obtain a permit from the State in order to conduct its operations on public land. 6/ On April 28, 1998, NDEP issued permit No. 0136

5/ The surface management regulations in 43 C.F.R. Subpart 3809 governing mining plans of operations provide at 43 C.F.R. § 3809.1-9(b) (1996) that "[a]ny operator who conducts operations under an approved plan of operations * * * may, at the discretion of the authorized officer, be required to furnish a bond in an amount specified by the authorized officer." Moreover, a 1996 Memorandum of Understanding (MOU) among NDEP, the United States Department of Agriculture, Forest Service, and BLM provides at page 8, Section VIII(1), that the "lead agency," which for an operation on public land administered by BLM would be BLM, in cooperation with NDEP, "shall specify the applicable reclamation standards and set the form and amount of the surety required for the reclamation." (Statement of Reasons (SOR), Tab 12A.) We note that the final bonding rule, 43 C.F.R. § 3809.1-9, promulgated by the Department on Feb. 28, 1997, 62 Fed. Reg. 9093, requiring 100 percent bonding on all notice and plan level operations was overturned by the United States District Court for the District of Columbia and remanded to the Department. Northwest Mining Association v. Babbitt, 5 F. Supp. 2d 9 (D.D.C. 1998).

6/ Under NAC 519A.045 a "[m]ining operation" means all activities conducted in this state by a person on or beneath the surface of land for the purpose of, or in connection with, the development or extraction of any mineral." The operator of each mining operation which becomes active after Oct. 1, 1990, must obtain a permit to mine from NDEP. NAC 519A.120(2). An operator must file a permit application with NDEP; however, when the operation is to be conducted on public land administered by BLM, the operator

to Pass Minerals. That permit apparently required the posting of a bond of $97,322, but it is not clear from the record how NDEP determined the amount of the bond or whether NDEP is the appropriate entity to establish the amount of the bond for a mining operation on public lands. 7/ In fact, even after issuance of its February 23, 1999, letter identifying $97,322 as the acceptable amount for the bond, the record indicates some confusion by BLM officials regarding the increased bond amount. 8/

The mining agreement between Pass Minerals and Industrial Construction required that Industrial Construction secure the bonding for plan of operations N54-95-031P. Industrial Construction entered into a surety agreement with Seaboard. In June 1998, copies of that agreement were filed with both NDEP and BLM. The agreement named NDEP as the obligee, rather than BLM. However, neither NDEP nor BLM rejected the bonding or notified Pass Minerals of that error or any other deficiency in the bonding until nearly 6 months later. 9/ In fact, in NDEP's letter to Pass Minerals in August 1998, NDEP stated: "Our records indicate that the current surety posted for the Mijo Project is $97,332." Thus, it would have been reasonable for Pass Minerals to assume, based on that statement and BLM's tacit approval, that its contractor, Industrial Construction, had properly filed the surety bond for the project.

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fn. 6 (continued)
may substitute a plan of operations approved by BLM for the application for permit. NAC 519A.150(1). In addition, "[e]vidence of a surety filed with the federal agency may be substituted for the surety required by NAC 519A.350." NAC 519A.150(2). NAC 519A.350(1) provides that "[a]n operator shall file a surety with the division or a federal land management agency, as applicable, to ensure that reclamation will be completed on privately owned and federal land." NAC 519A.360(1) requires the operator to provide surety in an amount sufficient to ensure reclamation of "(a) The entire area to be affected by his project or operation; or (b) A portion of the area to be affected if, as a condition of the issuance of the permit, filing additional surety is required before the operator disturbs land not covered by the initial surety." The operator's estimate of the cost of reclamation may be based on any method acceptable to NDEP or BLM. NAC 519A.360(3)(c).

7/ The 1996 MOU provides in Section VIII(2) at page 8 that for an operation such as that conducted by Pass Minerals, "the form and the amount of surety designated must be approved by the NDEP and the administering Federal agency." (SOR, Tab 12A.)

8/ "How did bond amount required increase from $52,000 (5-24-96) to $97,332 (now)??" (Note to file in IBLA 99-384, dated Apr. 7, 1999.)

9/ The regulation overturned by the court, see note 5, supra, provided that "[t]he authorized officer may reject any of the submitted financial instruments, but will do so by decision in writing, with a complete explanation of the reasons for the rejection, within 30 days of the offering." 43 C.F.R. § 3809.1-9(i) (1997).

However, Industrial Construction had not. The original surety agreement had not been filed with BLM; the agreement failed to name BLM as the obligee; and no rider was executed stating that the agreement was for the benefit of Pass Minerals. In May 1999, all those deficiencies were corrected when two bonds for $97,322, and appropriate riders, were filed with the Nevada State Office, BLM. Nevertheless, in his August 1999 decisions, the Nevada Deputy State Director, Minerals Management, BLM, determined that the attempt to bond in May 1999 was too late because the Las Vegas Field Office had properly suspended processing Pass Minerals' plan of operations in April 1999.

Although Pass Minerals did not have a proper bond filed with BLM until May 1999, it had reason to believe that, following the filing of copies of the Industrial Construction surety agreement with NDEP and BLM in June 1998, that it had complied with bonding requirements for its plan. In fact, Pass Minerals represents that in September 1998 mining operations were initiated under the plan. Not until November 1998 did it learn of deficiencies in the bonding. In February 1999, BLM provided Pass Minerals with the opportunity to file a proper bond within a designated period of time. Pass Minerals did not do so; however, the record shows that Pass Minerals was actively attempting to resolve the matter. By filing the bonds in May 1999, Pass Minerals showed its good faith in attempting to comply with the conditional approval of its plan of operations. Thus, at the time the State Director issued his decision on July 30, 1999, upholding the Las Vegas Field Office Manager's April 5, 1999, decision, two reclamation bonds had been filed with the BLM Nevada State Office for Pass Minerals' operations.

Accordingly, we conclude that Pass Minerals cured the bonding deficiency prior to the issuance of the State Director's decision, and that suspension of the processing of the plan of operations because of a failure to bond, at that point, was not justified. By satisfying the bonding condition, the approval of Pass Minerals plan of operations was completed. No further processing of the plan was required.

[2] We turn now to the other ground provided by the Las Vegas Field Office Manager for suspending consideration of the conditionally approved plan of operations, i.e., the pending validity examination. In his decision, the Field Office Manager cited the following quote from the Board's decision in Southwest Resources Council, 96 IBLA 105, 124, 94 I.D. 56, 67 (1987), as support for his action: "[I]f BLM determined that the claims were not supported by a discovery, the proper course of action would be to initiate a contest as to the claims' validity and suspend consideration of the plan of operations pending the outcome of the proceedings." The State Director upheld the Field Office Manager's decision stating that BLM had initiated a validity examination of the claim and that "[p]ending final outcome of the validity proceedings, the plan of operations shall not be further processed." (State Director's Decision at 10.)

However, the mere pendency of a validity examination is not a proper basis for suspending consideration of a mining plan of operations. Southwest Resources Council, supra, does not hold otherwise. It is not until the completion of such an examination with the appropriate reviews that BLM would know with certainty whether a claim was supported by the discovery of a valuable mineral deposit. If BLM determined that there was no discovery and initiated a contest, the suspension of consideration of a plan of operations would be justified. In this case, the record does not show that the validity examination has been completed or that any contest proceeding has been initiated by BLM against the validity of the Mijo 16 placer mining claim.

Thus, the two bases for suspending consideration of the plan of operations in this case do not support that action, and we set aside the Nevada State Director's decision upholding the suspension. Because suspension of the plan served as the basis for the two decisions of the Nevada Deputy State Director, Minerals Management, returning the surety bonds and riders with no action taken, those two decisions are also set aside. The case files are remanded for action consistent with this opinion. 10/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are set aside and the cases remanded to BLM. The petitions for stay are denied as moot.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge

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10/ We note that the case file in IBLA 99-371 shows that issues exist regarding whether mine tailings constitute personal property and whether sand and gravel has been improperly sold from the Mijo 16 claim. See Mid-Continent Resources, Inc., 148 IBLA 370 (1999). Those issues are not before us in these cases. We further note, in reference to a statement in the Nevada State Director's decision at page 8 that "the placer claim [is] located on lands withdrawn from mineral entry," that, if at the time the Mijo 16 placer mining claim was located the lands were withdrawn from mineral entry, the claim may be declared null and void ab initio. In its May 24, 1996, plan approval decision, BLM expressly stated at page 2 that "[a]pproval of this Plan of Operations will not now or in the future serve as a determination of the ownership or the validity of any mining claim to which it may relate." See Southwest Resources Council, 96 IBLA at 123-124, 94 I.D. at 67.